IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JAMES V.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND K.V.,
Appellees.

No. 2 CA-JV 2019-0057
Filed September 18, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20180441
The Honorable Wayne E. Yehling, Judge

AFFIRMED

COUNSEL

Law Office of Ransom Young P.L.L.C., Tucson
By Ransom Young
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Michelle R. Nimmo, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 James V. appeals from the juvenile court's April 2019 order adjudicating his son, K.V., born in 2012, dependent. On appeal, he argues the court erred by doing so based on a ground not alleged in the dependency petition and by improperly relying on the parents' insufficient parenting plan.[1] We affirm.

¶2 Under A.R.S. § 8-201(15)(a)(i), a "dependent child" is one who is "[i]n need of proper and effective parental care and control and . . . who has no parent or guardian willing to exercise or capable of exercising such care and control."[2] We review a dependency adjudication for an abuse of discretion, deferring to the juvenile court's ability to weigh and analyze the evidence. *Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 12 (App. 2015). We view the evidence in the light most favorable to sustaining the court's finding that the Department of Child Safety (DCS) proved the allegations of the petition by a preponderance of the evidence. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21 (App. 2005); *see also* A.R.S. § 8-844(C)(1) (allegations of dependency petition must be proved by preponderance of evidence). We will affirm the order "unless the findings upon which it is based are clearly erroneous and there is no reasonable evidence" supporting it. *In re Pima Cty. Juv. Dependency Action No. 118537*, 185 Ariz. 77, 79 (App. 1994).

¶3 In August 2018, based on a report that K.V. was "in crisis" at school and was "kicking, hitting, and throwing boxes at school staff," DCS

[1]The juvenile court also adjudicated K.V. dependent as to his mother, but she is not a party to this appeal.

[2]Sections 8-201 and 8-841, A.R.S., referred to in this decision, were recently amended. *See* 2019 Ariz. Sess. Laws, ch. 262, §§ 2, 6. These revisions are immaterial to the disposition of this appeal; we therefore cite to the current versions of the statutes.

took custody of him. Shortly before that incident, which was not the family's first contact with DCS, K.V. had threatened to shoot and kill school staff with James's gun. In September 2018, DCS filed a dependency petition alleging K.V. was dependent due to abuse or neglect, and alleging the following as to James:

> 1. The father neglects the child. The child is diagnosed with attention deficit hyperactivity disorder and obsessive-compulsive personality disorder. He displayed aggressive behaviors at school for the past year. He had 122 referrals during the last school year for hitting other children or throwing objects. The child has made threats to shoot people with a "gun" and wanting to kill school staff. The father has been receiving weekly in home services for the child. The behavioral health provider recommended the child be evaluated for medication, but the father does not want the child to take medication. The father recently agreed to begin the child on medication as of August 23, 2018. There is no indication the father attempted to obtain additional services to address the child's aggressive behavior. The child was behaving aggressively at school on August 23, 2018. The child was taken to the Crisis Response Center, but the father could not be located to admit the child. The mother was contacted and reported she wanted DCS to take custody of the child. Temporary custody was taken in order to provide the child with crisis behavioral health services. The father's failure to obtain sufficient behavioral health services for the child has likely resulted in the child's behavior escalating placing the child at risk of harm.
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> 2. The father neglects the child by exposing him to domestic violence. The mother and father have a history of engaging in

> domestic violence. The mother has obtained an order of protection against the father in the past. The mother reports her and the father have repeated verbal altercations in front of the child when exchanging the child for the mother's parenting time during which the father yells and uses profanity. On September 5, 2018 the mother was dropping the child off at school and the father was waiting at the school. The mother and father engaged in a verbal altercation in front of the child. The mother reports the father later contacted her work inquiring about her work schedule. The mother is intimidated by the father due to his aggressive behavior. There is a concern the child is learning his aggressive behavior from witnessing the father act aggressively. The father's aggression endangers the health and welfare of the child.[3]

¶4 At the conclusion of a dependency hearing that spanned multiple days over several months from late 2018 until April 2019,[4] the juvenile court found DCS had not proven abuse or neglect as to the parents, but nonetheless found K.V. dependent under § 8-201(15)(a)(i). The court stated, "I think I have made my feelings clear with respect to . . . the dependency . . . the parents have a defective parenting plan program that

[3]By way of example, James was arrested for aggravated assault after he confronted the driver of another vehicle and displayed a firearm in K.V.'s presence. The DCS case manager testified that, rather than expressing regret over the incident, James stated it was "important for him to confront the [victim] because the [victim] needed to see that [K.V.] was upset and crying."

[4]The juvenile court addressed both James's placement motion and the dependency petition on several of those days, but bifurcated the dependency and placement matters on the final day of the dependency hearing.

prohibits either of them from effectively parenting the child. And for that reason, I would find a dependency."[5]

¶5 Expressly relying on the "concerns raised in the dependency petition," the juvenile court determined K.V.'s "behavioral health issues . . . in large part" resulted from the parents' inability to communicate with each other to address his problems, and concluded he was left "in need of proper and effective parental care and control," and without a parent or guardian "who can exercise such care and control." *See* § 8-201(15)(a)(i). In its written ruling, the court similarly determined that K.V. was "in need of proper and effective parental care and control," and he did "not have a parent or guardian who can exercise care and control due to the mother and father's parenting time arrangement, which does not adequately take into account [K.V.'s] special needs." The court further noted, "The concerns raised in the dependency petition regarding [K.V.'s] behavioral health issues . . . [result] from the inability of the parents to properly communicate with each other to address the minor's behavioral health problems."

¶6 On appeal, James asserts the juvenile court erred by finding K.V. dependent based on a ground "not alleged in the dependency petition," which only alleged abuse or neglect as a statutory ground for dependency. He also argues the court improperly relied on the deficiencies in the parenting plan as a ground for the dependency. DCS maintains James has waived his claims by failing to object below. Although James concedes he did not object to the admission of evidence regarding the parenting plan as a ground for the dependency adjudication below, and assuming without finding he has thus waived his related claims on appeal, in the exercise of our discretion, we decline to deem his arguments waived. *See Logan B. v. Dep't of Child Safety*, 244 Ariz. 532, ¶¶ 9-11 (App. 2018) (appellate court's discretion whether to apply waiver doctrine).

¶7 James observes there was no motion to amend the petition to conform to the evidence, and relies on *Carolina H. v. Arizona Department of*

[5]Multiple times during the dependency proceedings, the juvenile court informed the parties it was concerned with family law issues in the case and expressly stated, "because of [K.V.'s] special needs . . . the parenting time plan . . . is inadequate. And because it's inadequate, there is a dependency." The court also stated, "And I'm not inclined to find abuse or neglect against either parent, but I am inclined to find that under the circumstances, [K.V.] does not have a parent or a situation where the parents can effectively parent him."

Economic Security, 232 Ariz. 569 (App. 2013), to argue the juvenile court lacked discretion to "deem the petition amended" to include the parents' unwillingness or incapacity under § 8-201(15)(a)(i). *See* Ariz. R. Civ. P. 15(b) (amendments to pleadings); *see also* Ariz. R. P. Juv. Ct. 55(D)(3) (incorporating Rule 15(b) for dependency adjudication hearings). We acknowledge that the court did not expressly deem the petition amended despite relying on a statutory ground for dependency not alleged in the petition. However, unlike in *Carolina H.*, 232 Ariz. 569, ¶ 9, where the court found a dependency existed *without* citing a statutory basis, the court here relied on the essential facts alleged in the petition to support a dependency adjudication as defined in § 8-201(15)(a)(i). And, also unlike in *Carolina H.*, *id.* ¶ 12, where the mother was not given the opportunity to factually challenge the court's theory of dependency, the court here advised the parties early in the dependency proceeding that it intended to rely on parental unwillingness or incapacity under § 8-201(15)(a)(i), specifically due to the inadequate parenting plan. The court then permitted DCS to present evidence related to that issue, and provided James ample opportunity to challenge that evidence, which he did.

¶8 Not only did James fail to object to the juvenile court's theory of dependency, but it is apparent he was fully prepared to address § 8-201(15)(a), and even assisted the court in identifying the appropriate subsection of the statute. Accordingly, as DCS points out, in light of the parties' implied acquiescence to proceed on a different ground than abuse or neglect, the court could have considered the petition amended by consent. *See* Ariz. R. Civ. P. 15(b)(2) (when parties try by express or implied consent issue not raised by pleadings, "it must be treated in all respects as if it had been raised in the pleadings"). In summary, the record establishes that James was neither unfairly surprised nor unfairly prejudiced by the ground for the court's ruling, and, in fact, participated in the dependency proceedings with a full understanding of the ground the court was considering.

¶9 Moreover, as DCS correctly contends, there is no statute or rule that requires a dependency petition to allege a specific ground for the dependency adjudication. *See* A.R.S. §§ 8-201(27) ("'Petition' means a written statement of the essential facts that allege . . . dependency."), 8-841(C)(3) (dependency petition shall contain "concise statement of the facts to support the conclusion that the child is dependent"). To the extent James suggests the court was not permitted to deviate from the ground DCS raised in the dependency petition, he has provided no persuasive authority

for that proposition, nor are we aware of any that would alter the outcome based on the facts in this case.

¶10 James also contends the juvenile court erred by finding an inadequate parenting plan constitutes a sufficient ground for a dependency and further maintains he is both willing and capable of caring for K.V. He asks that we vacate the dependency order and remand, directing the court to make "proper findings" pursuant to § 8-201(15)(a)(i).

¶11 While a child may be dependent for the purposes of § 8-201(15)(a) in a number of ways, one way, as established in subsection (i), is by a parent's unwillingness or incapacity to provide him with proper care and control. Because the primary concern in a dependency proceeding is the best interest of the child, "the juvenile court is vested with 'a great deal of discretion.'" *Willie G.*, 211 Ariz. 231, ¶ 21 (quoting *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239 (App. 1994)). The court here was presented with ample evidence showing that K.V. was "[i]n need of proper and effective parental care and control," that James was not "capable of exercising such care and control," and that adjudicating K.V. dependent was in his best interest, a finding well within the court's discretion to make. § 8-201(15)(a)(i); *see also Willie G.*, 211 Ariz. 231, ¶ 21. To the extent the court also considered the parenting plan in reaching that conclusion, we find no error, and James has identified none. And, to the extent James is asking us to reweigh the evidence in that regard, we note that "we do not re-weigh the evidence on review." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002).

¶12 We thus affirm the juvenile court's April 2019 order adjudicating K.V. dependent as to James.